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Strengthening the framework of International Law for a
more effective prevention and administration of justice**

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**The crime of enforced disappearance of persons:
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Virginia Balafouta

Lawyer, Teaching and Laboratory Staff at University of Athens,
PhD in International Law and Regional Studies, MSc
International Law and Diplomatic Studies, MSc History and
Philosophy of Science and Technology

Abstract: This paper analyzes the crime of enforced disappearance of persons in the framework of International Law, and submits ideas and proposals for a more effective prevention and administration of justice for this abhorrent crime. Towards this direction, it emphasizes on the International Convention for the Protection of All Persons from Enforced Disappearance. It also attempts to utilize other relevant legislative framework, relevant case law and experience gained by the international community on this specific crime. The proposals put forward focus on human beings/individuals and the need to be protected in any adversity they may have been found.

Keywords: The crime of enforced disappearance of persons; prevention; suppression; punishment; International Convention for the Protection of All Persons from Enforced Disappearance; international crimes; the right to the truth; extraterritorial application; administration of justice.

Introduction

The current paper analyzes the crime of enforced disappearance of persons in the light of International Law, and makes proposals for its more effective prevention, suppression and punishment.

Initially, it attempts the legal characterization of enforced disappearances, in accordance with the legislative framework of International Law. Subsequently, it analyzes with a critical eye the International Convention for the Protection of All Persons from Enforced Disappearance¹, and highlights its particular value. Special mention is also made to the right to the truth, due to its close connection with the issue of enforced disappearances and its great importance. From a systematic study of the relevant legislative framework and case law, principles are selected and presented, which contribute significantly to the prevention and

¹International Convention for the Protection of All Persons from Enforced Disappearance (2006):
<http://www.ohchr.org/Documents/ProfessionalInterest/disappearance-convention.pdf>

administration of justice for the specific crime. Furthermore, this paper presents ideas for the extraterritorial application of the legislative framework regarding enforced disappearances. In addition, it submits proposals for further specialization and quantification of specific terms, parameters and principles in the relevant legislation, with the aim of a more holistic and effective dealing with the crime of enforced disappearance.

The extreme seriousness of this crime lies in the fact that the victim is taken out of the state's jurisdiction, is deprived of any protection provided to him by the state as a guarantor of his rights, and is hence completely exposed to the commission of other crimes.

The crime of enforced disappearance is particularly associated with extrajudicial executions, which often follow. Also, in many cases of disappearances, victims, who are illegally detained, are subjected to torture. In other cases, victims are subjected into forced labor, or to trafficking. In cases of enforced disappearance of children, especially in Latin American countries, illegal adoptions of them were followed.

Legal characterization of enforced disappearances in the framework of International Law

According to article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance “enforced disappearance” is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the state or by persons or groups of persons acting with the authorization, support or acquiescence of the state, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

In the current Section, the legal characterization of forced disappearances of persons is attempted in the context of International Law. In the framework of International Law, enforced disappearances beyond a self-contained crime, as enshrined in the International Convention for the Protection of All Persons from Enforced Disappearance, may be included in the wider context and constitute a way of committing international crimes (Balafouta, 2017).

More specifically, according to article 8 of the Rome Statute² of the International Criminal Court (ICC), enforced disappearances

²Rome Statute of the International Criminal Court (1998): <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>

during a period of an armed conflict of international or not international character constitute war crimes, when committed intentionally, since they fall under the acts of taking of hostages (article 8.2.a.viii and 8.2.c.iii), unlawful confinement (article 8.2.a.vii), willful deprivation of the rights of fair and regular trial (article 8.2.a.vi).

Furthermore, enforced disappearances, when committed as part of a widespread or systematic attack directed against any civilian population, and the perpetrators have intent and additional awareness that their acts are part of that widespread practice, constitute crimes against humanity, according to article 7 of the Rome Statute of the ICC, since they fall under the enforced disappearance of persons (article 7.1.i and 7.2.i).

The article 7.2.i. defines “enforced disappearance of persons” as the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a state or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

Pursuing an expansive interpretation, it could be argued that enforced disappearances could also be included in the international crime of genocide. If it is taken into account that

enforced disappearances have often been followed by torture or extrajudicial executions, it could be stated that if these acts are committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, and there is also *dolus specialis* with regard to the destruction of the group, the crime of genocide is established, according to article 6.b of the Rome Statute of the ICC (regarding causing serious bodily or mental harm to members of the group) or 6.a (regarding killing members of the group).

Finally, it could be argued that the international crime of terrorism (Cassese, 2013) may also be committed through enforced disappearances, since i) these are illegal criminal acts under the national law of states (kidnapping), and ii) they have been used according to broad relevant case law of the European Court of Human Rights (ECHR) and of the Inter-American Court of Human Rights (IACHR) with political or ideological motives, by para-state and paramilitary organizations, in order to cause generalized terror to the civilian population. Therefore, if they are committed with the intention and *dolus specialis* to cause terror, they also constitute the international crime of terrorism.

Critical analysis of the International Convention for the Protection of All Persons from Enforced Disappearance

On the special seriousness and abhorrence internationally attributed to the crime of enforced disappearance, it is worth making some crucial references to the International Convention for the Protection of All Persons from Enforced Disappearance, from a critical point of view.

First of all, this Convention provides an adequate legal framework for the prevention and suppression of the crime of enforced disappearance of persons. Its provisions are characterized by clarity, combating impunity in every way. It seems that, during the adoption and formulation of the articles, the accumulated experience of the commission of the crime in various states and of the initial difficulties of defining and prosecuting the crime, must have been taken into account. This Convention adopts a strict approach against the particular crime, minimizing the possibility of application of limitations and of mitigating factors. Furthermore, it states that no exceptional circumstances, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance. It calls on all states to make enforced disappearance of persons a punishable crime of particular seriousness in their domestic Criminal Law as well. It also emphasizes that this crime has a

continuous nature, and that the investigation should not be terminated before the fate of the missing person, the violations committed and their perpetrators are fully clarified.

It is worth noting two provisions of the International Convention for the Protection of All Persons from Enforced Disappearance, which are highly indicative of the extreme gravity of the particular crime, and which could be utilized in relevant cases. Firstly, the authorities shall undertake an investigation, even if there has been no formal complaint. Secondly, it shall not be regarded as a political offense, or as an offence inspired by political motives. According to article 12§2, if there are reasonable suspicions that a person has suffered an enforced disappearance, the state is obliged to conduct an investigation, even if no request has been submitted. The *ex officio* prosecution of the crime is established, along with the recognition of a particularly widened legal interest for its invocation. In addition, article 13§1 excludes the characterization of acts related to the disappearance of persons as political. In particular, the provision stipulates that in cases of extradition of an accused person between states, the specific crime must in no case be judged to be a political offense, or to be connected to a political offense, or to have been committed with political motives, and it is not possible to refuse to extradite the person on this basis.

The International Convention for the Protection of All Persons from Enforced Disappearance protects and promotes the right to the truth, the right to information, the right to reparation/rehabilitation, the right to family, the right for the protection of childhood, the right to identity, and lays down guarantees for the legality in the detention of a person, prohibiting -among other things- secret detention. Also, in article 24§1 gives an expanded definition of the notion of the victim, including as victims of the crime both the disappeared person and any other person who has suffered harm as the direct result of the enforced disappearance.

Finally, an issue of particular interest in the Convention in question is the establishment and the definition of the operation and the functions of the Committee on Enforced Disappearances. The aforementioned Committee consists of ten experts of high moral character and recognized competence in the field of human rights, who have to serve in their personal capacity and have to be independent and impartial.

The states parties have an obligation of general cooperation with this Committee, an obligation to submit reports on the implementation of the Convention; they are also obliged to respond to observations that the Committee is going to submit in its annual reports. Provided that such jurisdiction has been recognized by the state, this Committee may be referred to a

missing person case by any person establishing a legal interest, in the event that domestic remedies within the state have been exhausted, or in the event that the specific domestic procedures last an unreasonably prolonged period of time in order to avoid negation. In this case, it may request information from the state, make recommendations to it for taking appropriate measures and cooperate with the state to find the specific person, while keeping the applicant informed. In addition, this Committee has the competence to visit, inspect and cooperate with a state party of which it has reasonable information that it is in violation of the Convention. Particularly important is the authority granted to it, to bring to the attention of the General Assembly of the United Nations (UN), through the Secretary-General of the UN, well founded indications that enforced disappearance is being practised on a widespread or systematic basis in the territory under the jurisdiction of a state party to the Convention.

Therefore, it could be argued that the Committee on Enforced Disappearances operates in complementarity with the international and the national courts in preventing and suppressing the crime of enforced disappearance. This could be supported due to its enhanced role and its competences to assist and under certain circumstances to supervise and control the competent national authorities of the states parties to the Convention.

The crime of enforced disappearance of persons and the right to the truth

The right to the truth (Balafouta, 2018) is a modern and a stand-alone right of particular importance and magnitude, as it relates to serious violations of International Human Rights Law, International Humanitarian Law and International Criminal Law. This right, which has emerged as an imperative necessity, is closely linked to the issue of enforced disappearance of persons and the issue of war reparations.

The right to the truth was widely used and began to be established in International Law in relation to the need to clarify the crime of enforced disappearance. On the specific crime, the right to the truth is defined as the right of the relatives of the disappeared persons to know the whole truth about the fate and the whereabouts of their loved ones, the progress and the results of the ongoing investigations, the events that took place, the circumstances under which the violations took place and their causes, the perpetrators, the reasons that led to these persons' victimization, and in case of the victim's death the return of his body to his relatives.

The position that long-term uncertainty and anxiety about a person's fate causes his relatives psychological pain that constitutes inhuman treatment is a particularly important

contribution of the Strasbourg Court's case law to the promotion of the right to the truth. The suffering of relatives -in addition to the disappearance of their beloved person- is connected and is also caused by the attitude of the state authorities towards them. The investigation must not be terminated by finding the missing person's body or by presuming his death, but by finding and prosecuting perpetrators and dealing out justice.

In the same direction, the International Convention for the Protection of All Persons from Enforced Disappearance -as mentioned above- gives a broader definition of the notion of the victim, by including as victims of the crime both the disappeared person and any other person who has suffered because of this disappearance.

Significant contribution of the international legislation and of the relevant case law of the ECHR and the IACHR

From the systematic study of the international legislation and of the case law of the European Court of Human Rights and of the Inter-American Court of Human Rights, concerning the crime of enforced disappearance of persons, some emerging significant principles are set out below:

- i) its recognition as a continuous crime,
- ii) the obligation of the state to continue the investigation until the clarification of the fate of the missing person and of the

violations committed, as well as the obligation of the state to prosecute the perpetrators,

- iii) the widening of the notion of the victim,
- iv) the recognition that the state violates the prohibition of inhuman treatment as regards the relatives of the missing person as long as the crime has not been fully elucidated,
- v) the prohibition to accept justifications or restrict reparations,
- vi) the obligation of international co-operation.

Consequently, they constitute an extremely important legal acquis for the prevention and repression of the crime of enforced disappearance of persons, and leave no room for invoking the category of missing persons by the perpetrator or a third party for extending impunity.

Possibilities of extraterritorial application of the legislative framework for the enforced disappearance of persons

In the context of this paper, the extraterritorial application of the legislative framework for the enforced disappearance of persons is proposed and attempted to be established.

In particular, starting from the International Convention for the Protection of All Persons from Enforced Disappearance, the following could be mentioned.

According to article 9§1, each state party shall take the necessary measures to establish its competence to exercise

jurisdiction over the offence of enforced disappearance: (a) When the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that state; (b) When the alleged offender is one of its nationals.

According to article 9§2, each state party shall likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another state in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized.

From the above mentioned it becomes clear that the extraterritorial application of the International Convention for the Protection of All Persons from Enforced Disappearance is possible for the states parties to the Convention. Therefore, the states that have ratified this Convention undertake to apply it in their national territory as well as in other territories over which they exercise jurisdiction.

In case of an armed conflict or an occupation regime, the extraterritorial application of the protection framework provided by this Convention could be supplemented and strengthened by the relevant framework of International Humanitarian Law, given that in the aforementioned cases the International Human

Rights Law and as *lex specialis* the International Humanitarian Law are applied.

This argument could be combined also with article 43 of the International Convention for the Protection of All Persons from Enforced Disappearance, which states that this Convention is without prejudice to the provisions of International Humanitarian Law, including the obligations of the high contracting parties to the four Geneva Conventions of 12 August 1949 and the two Additional Protocols thereto of 8 June 1977, or to the opportunity available to any state party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by International Humanitarian Law.

Proposals for quantification and further specification of certain terms, parameters and rules of the relevant legal framework

In every legal matter, the clarity and the precision in the wording of the provisions contribute to their effective and complete implementation. In addition, the introduction of some quantitative parameters, some numerical elements helps to set the obligations in a more specific and defined way and makes it easier to control their implementation.

Towards giving an end to impunity, in this paper it is argued that at international level, there is a need for quantification and further specification of certain terms, parameters and rules of the legal framework relating to the crime of enforced disappearance of persons. In particular, it could be suggested that a rebuttable presumption should be introduced that after a certain period of time the victim should be presumed dead, which -of course- would not result in the termination of the investigation. The ratio of such a provision would be to facilitate legal proceedings, aggravate the position of perpetrators, and limit the impunity. Such a presumption is presented in case law of the IACHR. However a general rule could also be set at legislative level, which rule could have general application and could set a specific precise time period for fulfilling the presumption.

In addition, after a certain period of time if the state has not investigated or failed to provide relevant information and evidence about the crime, that would constitute an aggravating factor. Indeed, it could be introduced a state obligation to initiate a thorough and impartial investigation, within a certain period of time, if there were reasonable grounds, given that the International Convention for the Protection of All Persons from Enforced Disappearance defines it as a crime prosecuted ex officio. It would also be possible to set a point in time after which the state would be obliged to provide remedies to the

relatives of the missing person, regardless of the course of the ongoing investigation. Finally, an obligation could be introduced for the state, in which such cases are pending, to submit periodic progress reports/updates concerning these cases, to an international entity of common acceptance.

Furthermore, for a state that there are well founded indications that enforced disappearance is being practised on a widespread or systematic basis in its territory or under its jurisdiction, it could be set the following presumption. In procedural terms, this state's denial of conducting effective investigation and of providing any information concerning enforced disappearance of persons could be equivalent to confession of committing the crime, and therefore to full proof. Thus, there could be a transition from the presumption of innocence to a "presumption of guilt", in order to oblige the state to provide the due cooperation, and to prevent the invocation of the category of missing persons in order to extend impunity.

It becomes clear that the introduction of specific quantitative parameters to the legislation concerning enforced disappearances could contribute towards limiting impunity and possible indifference, inaction, inefficiency or attempt to cover up such cases on the part of the competent national authorities of the states.

Conclusions

In conclusion, this paper attempts to analyze the crime of enforced disappearance of persons under International Law, and makes suggestions for a more holistic and effective dealing with it, aiming at the maximum possible protection for individuals in any circumstances. It highlights the particular abhorrence of this crime.

It argues that, in the framework of International Law, enforced disappearances beyond a self-contained crime -as enshrined in the International Convention for the Protection of All Persons from Enforced Disappearance- may be included in the wider context and constitute a way of committing international crimes, namely war crimes, crimes against humanity, the crime of genocide and the crime of terrorism. Thus, for the prevention and prosecution of this crime, it becomes possible to utilize the relevant framework of International Criminal Law, which is highly strict and binding, and consists of jus cogens rules that create obligations erga omnes.

The special value of the International Convention for the Protection of All Persons from Enforced Disappearance is highlighted and analyzed with a critical eye. Reference is also made to the right to the truth in relation to the need for justice for the crime of enforced disappearances. Additionally, valuable principles are selected from the relevant international legislation

and from the relevant case law of the European Court of Human Rights and of the Inter-American Court of Human Rights.

This paper supports and establishes the extraterritorial application of the International Convention for the Protection of All Persons from Enforced Disappearance for the states parties to the Convention, highlighting their obligation to apply it in their national territory as well as in other territories over which they exercise jurisdiction. Moreover, in case of an armed conflict or an occupation regime, it supports the extraterritorial application of the protection framework provided by this Convention combined with the relevant framework of International Humanitarian Law.

Aiming to fight impunity, the current paper suggests that, at international level, there is a need for quantification and further specification of certain terms, parameters and rules of the legal framework relating to the crime of enforced disappearance of persons. Therefore, it submits ideas, proposals, and presumptions for a more effective prevention, suppression and administration of justice for this abhorrent crime.

It could be argued that the crime of enforced disappearance of persons goes beyond death, because in the absence of confirmation by the offending state whether the disappeared is alive or not and by concealing the location of his body the “core of human existence” is being questioned.

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